87 1112

No. _____

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States
OCTOBER TERM, 1987

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

PHILIP G. MINARDO
Attorney for Appellant
Frank V. Ponterio
350 St. Marks Place, Suite 305
Staten Island, NY 10301
(718) 442-0800

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTION PRESENTED FOR REVIEW

Whether the combination of at-large and local members of the Board of Estimate in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and *amici curiae* participated in the proceedings before the Court of Appeals:

(i) *Plaintiffs-Appellees:* Beverly Morris, Joy Clarke Holmes, Joanne Oplustil

(ii) *Defendants-Appellants:* THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

(iii) *Intervenor-Defendant-Appellants:* Frank V. Ponterio; Robert A. Straniere, individually and as a member of the New York State Assembly

(iv) *Amici Curiae:* John J. Marchi, John F. Banzhaf III, Staten Island League for Better Government, Citizens Union of the City of New York, Peter F. Vallone and other members of the New York City Council

The Municipal defendants and intervenor Straniere have joined in a separate, companion appeal to this Court.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
The Parties to the Proceedings Below	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provision and State Statutes Involved	3
Statement of the Case	4
Reasons for Plenary Consideration by the Supreme Court	7
The Court of Appeals Erred in Affirming a Decision on a Summary Judgment Motion When Contested Issues of Material Facts Were Presented	7
The Decision of the Court of Appeals Contradicts Prior Decisions of the Supreme Court, the Court of Appeals, and the New York Court of Appeals	10
The Decision of the Court of Appeals to Eliminate At-Large Members from the Analysis was Arbitrary and Will Undermine the Implementation of Innovative Forms of Local Government	14
The Board of Estimate Provides a Constitutionally Acceptable Instrument of Local Government	17

Pages

Conclusion 22

Exhibit A 23

TABLE OF AUTHORITIES

Abate v. Mundt, 403 U.S. 182 (1971) 7,11

Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981), *Summ. aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982) 16

Avery v. Midland County, 390 U.S. 474 (1968) 11,14

Boyer v. Gardner, 540 F. Supp. 624 (D.N.H. 1982) ... 15

Continental Casualty Co. v. City of Richmond, 708 F. 2d 1483 (9th Cir. 1985) 9

Cosner v. Dalton, 572 F. Supp. 350 (E.D. Va. 1981) .. 15

Davis v. Mann, 377 U.S. 678 (1964) 15

Empire Electronics Co. v. United States, 311 F. 2d 175 (2d Cir. 1975) 9

Franklin v. Krause, 32 N.Y. 2d 234 (1973), *appeal dismissed* 415 U.S. 904 (1974) 10

Friedman v. Meyers, 482 F. 2d 435 (2d Cir 1973) 9

Greenwald v. Board of Supervisors, 567 F. Supp. 200 (S.D.N.Y.), *aff'd without opinion*, 742 F.2d 1434 (2d Cir. 1983) 11

Pages

Iannucci v. Board of Supervisors, 20 N.Y. 2d 244 (1967) 11

Jaroslawicz v. Seedman, 528 F.2d 727 (2d Cir. 1975) . 9

Kilgarlin v. Hill, 386 U.S. 120 (1967) 15

Kilgarlin v. Martin, 252 F.Supp. 404 (S.D. Texas 1966) 15

League of Women Voters v. Board of Supervisors of Nassau County, 737 F. 2d 155 (2d Cir. 1984) 11,13

Mahan v. Howell, 410 U.S. 315 (1972) 15,16

Reynolds v. Sims, 377 U.S. 533 (1964) 11,16

Sailors v. Board of Education, 387 U.S. 105 (1967) ... 14

United States v. Diebold, Inc., 369 U.S. 654 (1962) ... 9

Washington Post Co. v. Keogh, 365 F.2d 965, 125 U.S. App. D.C. 32, *cert. denied* 385 U.S. 1011 9

Whitcomb v. Chavis, 403 U.S. 124 (1971) 11,13

CONSTITUTION AND STATUTES

U.S. Const. amend. xiv 3

New York City Charter Section 61 3

New York City Charter Section 62 3

OTHER AUTHORITIES

Page

Groffman and Scarrow, "The Riddle of Apportionment: Equality of What?", National Civic Review, 242 (1981) 10

Groffman and Scarrow, "Weighted Voting in New York," iv Legis L.Q. 287 (May 1981) 11

Supreme Court of the United States
OCTOBER TERM, 1987

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 (A5) (Numbers in parentheses preceded by the letter "A" refer to the Appendix submitted with this Jurisdictional Statement).

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reported at 592 F. Supp. 1462 and 647 F. Supp. 1463 (A55, A119).

The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a decision dated May 16, 1983, held that the New York City Board of Estimate is subject to the one-person, one-vote principle. This decision, which reversed the initial judgment entered by the trial court, is reported at 707 F.2d 686 (A186).

The first decision of the United States District Court for the Eastern District of New York is reported at 551 F. Supp. 652 (A208).

JURISDICTION

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. Sections 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987 affirming the trial court's grant of plaintiffs' motion for summary judgment.

A Notice of Appeal to this Court on behalf of Intervenor-Defendant-Appellant Frank V. Ponterio was timely served and filed in the Court of Appeals for the Second Circuit on December 16, 1987. The municipal appellants and Intervenor-Defendant-Appellant Robert A. Straniere served and filed notices of appeal on October 15, 1987 and November 6, 1987 respectively.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(2) in that the Court of Appeals held a state statute to violate the United States Constitution.

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

Section 61: *Membership.* The mayor, the comptroller, the president of the Council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: *Voting in the board.*

a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which

it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT OF THE CASE

Appellees (plaintiffs below), residents of the Borough of Brooklyn within the City of New York, commenced this action in December 1981 seeking declaratory and injunctive relief to remedy their alleged underrepresentation on the Board of Estimate. The Board of Estimate is a municipal body composed of 8 *ex officio* members: the Mayor, Comptroller, City Council President (each of whom has 2 votes on the Board), and the Presidents of 5 boroughs of the City (each of whom has 1 vote on the Board). Plaintiffs complain that equal votes for all borough Presidents, notwithstanding unequal borough populations, results in a constitutionally unacceptable malapportionment of the Board.

Appellant Ponterio, a resident of Staten Island, intervened as a defendant in March 1982. Ponterio believed his participation could help to resolve the unique analysis issues inherent in this case by virtue of his qualifications as an attorney and as an engineer with over 30 years of experience, primarily in mathematical analysis of complex systems.

Appellees moved for summary judgment in April 1982, and appellants cross moved. On December 1, 1982, the trial court granted appellants' motion dismissing the complaint on the ground that, as a matter of law, the Board is not subject to the one person, one vote doctrine. On May 16, 1983, the Court of Appeals for the Second Circuit reversed and remanded the case for a hearing on whether the Board, as constituted, offends the equal protection clause.

Upon remand, the trial Court bifurcated the case; first to decide upon an appropriate methodology for quantifying malapportionment and the resultant deviation, and second to rule on whether legitimate state interests justified such deviation. Appellant Ponterio submitted proposed analysis methodologies showing malapportionment to be within acceptable bounds and moved to deem methodology issues resolved. Appellees moved for summary judgment on the basis of an alleged deviation of 132.9% obtained by excluding the at-large members from the analysis and computing deviations of actual borough populations from an "ideal" borough population (i.e., one-fifth of the City population). The trial Court issued a Memorandum and Order adopting Appellees' methodology and deviation percentage.

Subsequently, the parties and *amici* submitted memoranda of law and affidavits on the justification issue. Appellees re-raised the methodology issue by admitting that a different method, district voting power, is a constitutionally acceptable means for apportioning and analyzing the Board, and presenting a proposed Board reapportionment following (albeit incorrectly) voting power principles. Appellant Ponterio responded with several voting power analyses showing the Board to be apportioned within constitutional bounds and challenging

Appellees' computations as erroneous. Several rounds of argument and counter-argument by Appellant Ponterio and Appellees ensued. No other parties participated in these exchanges.

On November 19, 1986, the district court ruled that defendants had failed to justify the adjudged deviation of 132.9%, while acknowledging the legitimacy of historic, geographic and functional reasons advanced in support of the Board's composition and voting system. The court noted the existence of alternative plans with smaller deviations from strict voter equality that would substantially further those state interests. The court did not address the voting power arguments raised by intervenor Ponterio during the justification phase even though those arguments were submitted with the Court's approval.

On October 8, 1987 the Second Circuit affirmed. The Court of Appeals (per Oakes, J.) held that "in calculating voter equality for equal protection purposes the City-wide members should be, if not ignored, not considered in the appropriate analysis" (A33). In a separate concurrence, Judge Newman, while joining the majority, opined that in some circumstances the equal protection clause might permit local governments to combine "dominant" at-large members with single-member districts of different populations (A51-53).

This appeal followed.

REASONS FOR PLENARY CONSIDERATION BY THE SUPREME COURT

This appeal raises issues of first impression in apportionment law. Never before has any court been asked to rule upon the constitutionality of a governmental body that combines at-large and local members such that, in virtually every voting circumstance, the at-large members hold a controlling majority of votes. Never before has there been a case involving a governmental body whose composition, voting procedures, and functions are so specifically tailored to the unique requirements of a huge and diverse metropolis like New York City. Never before has a case made so manifest the lingering uncertainties in the one person, one vote doctrine and the fundamental inapplicability of traditional apportionment analysis methods to a specialized instrument of local government. No other case of such importance has been so summarily decided. Plenary consideration by this court is warranted to protect the rights of New York City's 7 million residents and to resolve unsettled apportionment issues.

THE COURT OF APPEALS ERRED IN AFFIRMING A DECISION ON A SUMMARY JUDGMENT MOTION WHEN CONTESTED ISSUES OF MATERIAL FACTS WERE PRESENTED.

On remand after the first appeal of this action the District Court held a scheduling conference in which it was agreed that defendants, having the burden of proof, would submit briefs on methodology issues and plaintiffs would respond. Rather than respond to defendants' briefs, plaintiffs moved for summary judgment asserting the applicability of unmodified *Abate* analyses (following *Abate v. Mundt*, 403 U.S. 182 (1971)). Before responses to plaintiffs' motion were completed, a pre-trial status conference was ordered for February 1, 1984. At that con-

ference, Judge Neaher stated that he was considering ordering a trial or hearing so that a complete record on methodology issues could be made. No trial or hearing was held. Instead, in August 1984 he issued a Memorandum and Order adopting the unmodified *Abate* method, without notice and without providing any opportunity for factual or other testimony. His choice of methodology was based on an observation that since there is a single tier of borough representatives on the Board, viz., the five Borough Presidents, *Abate* method percent deviations should be calculated among those five members alone (A149). Judge Neaher decided that the Second Circuit was mistaken in believing that the Board's design raises novel apportionment issues (A136) and ruled out consideration of any method that takes into account the presence on the Board of the 3 at-large members (A179 at n. 8).

By contrast, the Court of Appeals premised its selection of the unmodified *Abate* method on findings of facts that are not supported by a single word of testimony or other competent evidence in the record, i.e., that "citywide Board members and borough presidents represent different interests (A30); that "borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have *qua* residents of a particular borough" (A32), and that "City-wide members . . . must be supposed . . . to represent . . . the interests of their constituents *qua* residents of New York City (A32). The only competent evidence in the record is precisely to the contrary. In the justification phase of these proceedings Mayor Edward I. Koch submitted an affidavit in which he specifically denies the existence of a two-tiered Board. Borough President Ralph J. Lamberti submitted an affidavit in which he states that his representation is not limited to only the parochial interests of Staten Island residents (but also encompasses the interests of all citizens of New York City).

No citizens testified. Apart from the Koch and Lamberti affidavits, no board members testified. The Court below offers no clue as to how it was able to divine what is in the minds of board members and citizens. It doesn't state whether its determination applies to all citizens or some citizens, to all board members or some board members. This speculative determination is the crux of the Court's decision. Only by assuming the Board to be two-tiered is the Court able to support its selection of the unmodified *Abate* methodology and the resultant malapportionment percentage.

It is well settled that the function of a court of appeals as well as a trial court on a motion for summary judgment is merely to determine whether triable issues of material facts exist, not to try such issues, *Empire Electronics Co. v. United States,* 311 F.2d 175, 179 (2d Cir. 1975), *Continental Casualty Co. v. City of Richmond,* 708 F. 2d 1483, 1487 (9th Cir. 1985); particularly where the facts are gleaned only from affidavits, *Jaroslawicz v. Seedman,* 528 F. 2d 727, 731 (2d Cir. 1975); and involve questions of intent or a subjective state of mind. *Washington Post Co. v. Keogh,* 365 F. 2d 965, 967, *aff'd* 125 U.S. App. D.C. 32, *cert. denied* 385 U.S. 1011, see *Friedman v. Meyers,* 482 F. 2d 435, 438-39 (2d Cir. 1973). Moreover, where the Court is confronted with a choice of inferences to be drawn from underlying facts in affidavits and exhibits, the inferences "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The Court of Appeals erred in trying a factual issue raised *sua sponte* with "facts" the Court itself invented notwithstanding the presence in the record of affidavits contradicting the Court's inferred "facts."

THE DECISION OF THE COURT OF APPEALS CONTRADICTS PRIOR DECISIONS OF THE SUPREME COURT, THE COURT OF APPEALS, AND THE NEW YORK COURT OF APPEALS.

Two decades after the promulgation of the one-person, one-vote principle, there remains considerable uncertainty over what it means. Grofman and Scarrow, "The Riddle of Apportionment: Equality of What?," National Civic Review, 242 (1981). The decisions of the Courts below simply add to the confusion. Upon the first appeal of this action, Intervenor Ponterio argued that reapportionment of the Board in conformity with ordinary representational standards would effectively disenfranchise the borough of Staten Island. The Court responded: "the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy." (A204).

On the other hand, to avoid just such a result for county boards of supervisors throughout New York State (which, like the Board of Estimate, are bodies of local government composed of *ex officio* members, and which function only by voting), the state courts sanctioned an entirely different concept of vote apportionment, viz., district voting power.[1,2] *Franklin v. Krause*, 32 N.Y.2d

1. The objective of district voting power apportionment is to give each constituent town a mathematical probability of affecting board vote outcomes proportional to its relative population. For example, if town A has 10% of the total county population, its representative should have 10% of all decisive votes. "Decisive" means that if a town's vote is changed, the vote outcome of the board (e.g., achievement of a majority) is changed. By contrast, ordinary representational apportionment would allocate 10% of the number of representatives (or votes) to town A, without regard to the resulting ability of towns to affect vote outcomes.

234 (1973), *appeal dismissed* 415 U.S. 904 (1974), *Iannucci v. Board of Supervisors*, 20 N.Y.2d 244 (1967). Of New York's 57 counties outside New York City, 24 have been so apportioned. Grofman & Scarrow, "Weighted Voting in New York," iv Legis L.Q. 287, 288 (May 1981).

By dismissing the appeal in *Franklin* for want of a substantial federal question, the Supreme Court has implicitly approved district voting power apportionment. The Second Circuit Court of Appeals has approved it explicitly. *League of Women Voters v. Board of Supervisors of Nassau County*, 737 F.2d 155 (2d Cir. 1984), *Greenwald v. Board of Supervisors*, 567 F.Supp. 200 (S.D.N.Y.), *aff'd without opinion*, 742 F.2d 1434 (2d Cir. 1983).

For single-member districts, ordinary representational standards require essentially equal district populations. *Reynolds v. Sims*, 377 U.S. 533 (1964), *Avery v. Midland County*, 390 U.S. 474 (1968). For multi-member districts, those standards require essentially equal population-per-representative ratios. *Abate v. Mundt*, 403 U.S. 182 (1971), *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In neither case is there any regard to the effect such apportionment has on the opportunity for any district to affect outcomes of a vote by the governmental body. District voting power apportionment and representational apportionment have completely different objectives. Indeed, in voting power apportionments, smaller districts must be given a far greater number of representatives or

2. This concept commonly referred to as weighted voting since it is usually implemented using weighted votes rather than multiple members to preserve the effectiveness derived from the small size of such boards. Nevertheless, the operative feature of this concept is that it equalizes district voting power, not representation. Use of weighted votes is incidental.

votes than would be determined by ordinary representational standards. For example, in the Nassau County case examined in *League*, the smallest town, Glen Cove, was allotted three times the number of votes justified by equalization of population-per-vote ratios.[3] The maximum deviation of the board approved in *League* is 5.26% if analyzed in terms of voting power but is 85.58% if analyzed by the *Abate* (population-per-vote ratio) method. Corresponding deviations for the Board of Estimate are 11.55% and 77.95%.

Following plaintiffs' admission that district voting power apportionment is an acceptable method for applying constitutional one-person, one-vote principles to the Board of Estimate, intervenor Ponterio presented appropriate computations to the District Court, and subsequently to the Court of Appeals, that account for the presence of the three at-large members as well as the five borough members. Neither court commented on these computations in its decision. Nor did either court reconcile its disapproval of Board apportionment with the Second Circuit's approval of the Nassau County Board in *League* whose malapportionment by *Abate* standards exceeds that of the Board of Estimate. The city defendants presented no methodology argument in the District Court. On the second appeal they suggested a different voting power method, viz., citizen voting power (also termed the "Banzhaf index"). Citizen voting power purports to measure the power of a citizen to affect board vote outcomes, acting through his representative. It is calculated by

3. Glen Cove had a population of 24,618 or 1.86% of the total county population of 1,321,582. By *Abate* standards, it should have been allocated 1.8% of the total of 108 board votes (i.e., 2 votes). Instead it was allocated 6 votes so that its voting power would be commensurate with its population.

multiplying his district's voting power by his power to elect board representatives. The first component is identical to district voting power described above. Intervenor Ponterio does not favor this method because its second component relies upon many unrealistic assumptions and an essential ingredient has been rejected by the Supreme Court. *Whitcomb*, 403 U.S. at 145-46.

The Court of Appeals also rejected the citizen voting power method. However, in doing so, it contradicted its own acceptance of the *district* voting power method in *League* and *Greenwald*, as well as the Supreme Court's acceptance of that method in *Franklin*. The Court finds "seriously defective" the method's assumptions of the "same weight . . . and same probability of occurrence for each of the 552 possible voting combinations in which a single Board member can determine outcome" (A27).[4] This very premise underlies the district voting power analysis approved in *Franklin*, *League*, and *Greenwald*. *League*, 737 F. 2d at 168-69. It is not clear whether the Court understood that, in rejecting this component of the *citizen* voting power method, it was also rejecting the *district* voting power method altogether. The Court may have been misled by the city defendants' brief in which the two methods were confused and inaccurately described.

4. Among other things, the Court confuses voting combinations with decisive votes. Obviously, for an 8-member board, there are 2^8 or 256 possible voting combinations. In 168 of them (for a simple majority of 6 votes out of 11 votes) one or more members holds a decisive vote. The total number of decisive votes for all members in all these 168 combinations is 552. It should be noted that the method does not require an assumption of equal probability of occurrence of all voting combinations. Any distribution of probabilities can be incorporated in the analysis. In the absence of known, actual probabilities, the best estimate from an analysis perspective is that the probabilities are equal.

The Court of Appeals continues its contradiction of prior decisions by stating that "voter power over outcome is irrelevant to equal protection analysis" (A44) and that the equal protection clause protects "the equalization of voter representation, not interest representation" (A34). Obviously, both *Franklin* and *League* acknowledge the protection of interests (i.e., of towns, not of citizens) by equalizing the voting power that towns have over board vote outcomes.

THE DECISION OF THE COURT OF APPEALS TO ELIMINATE AT-LARGE MEMBERS FROM THE ANALYSIS WAS ARBITRARY AND WILL UNDERMINE THE IMPLEMENTATION OF INNOVATIVE FORMS OF LOCAL GOVERNMENT.

The Board of Estimate is the most powerful local governmental body of the most important city in the nation. Its composition and voting procedures are unique. Together with the City Council, it comprises the country's only bicameral municipal government. It is the paramount example of the kind of innovation the Supreme Court has recognized as essential.

> "[v]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions," *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1968).

Innovative forms of government also need innovative scrutiny to assess their compliance with one-person, one-vote principles. The response of the courts below has been to strip the Board of all its salient features until a residue is left that can be analyzed by *Abate* methodology. If square pegs are repeatedly forced into round holes, sooner or later all pegs will be round.

The Court below cited two reasons for adopting the unmodified *Abate* method. First, it agreed with the District Court that the method has been used to analyze malapportionment in other cases involving a combination of at-large and local representatives. Second, it concluded, on the basis of pure conjecture as to factual matters, that the Board is two tiered; one tier composed of 3 at-large members and a second tier composed of 5 local members, and that each tier must be analyzed separately.

In none of the cases relied upon by the courts below was analysis methodology in issue and in none of those cases would the conclusion have been materially affected by inclusion of at-large members in the analysis. Particularly noteworthy is the courts' reliance on *Avery*. Not only was there no issue raised therein as to choice of methodology, there was no analysis whatever. The sole issue was whether a unit of local government is subject to the one-person, one-vote principle in the first instance. The defendants in *Avery* made no claim that their apportionment plan met any constitutional test. In fact, they testified that population was not an apportionment criterion. Moreover, the courts below ignored altogether those cases in which at-large (floterial) members *were* included in apportionment analyses. *Davis v. Mann*, 377 U.S. 678 (1964); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Mahan v. Howell*, 410 U.S. 315 (1972); *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Texas 1966); *Cosner v. Dalton*, 572 F.Supp. 350 (E.D. Va. 1981); *Boyer v. Gardner*, 540 F.Supp.624 (D.N.H. 1982), and those Courts' own deci-

sions, *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981) *summ. aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982).

There can be little doubt that the courts below hypothesized a two-tiered Board simply to avoid the slightly more complex task of assessing the Board as it undeniably exists—an inseparable 8-member body (A183 at n.16). The courts below had a golden opportunity to make a significant contribution toward a clarification of unsettled issues in apportionment law. They failed to assume that burden.

It is earnestly hoped that the Supreme Court will seize the opportunity. Mathematical uncertainty has been repeatedly used as the favorite excuse for not grappling with innovative apportionment plans. We were initially led to expect otherwise:

> "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath of office requires no less of us." *Reynolds*, 377 U.S. at 566.

Nevertheless, this court backed away from that pledge 9 years later in its famous footnote, "We decline to enter this imbroglio of mathematical manipulation," *Mahan v. Howell*, 410 U.S. 315, 319, n. 6. In truth, the imbroglio in *Mahan* had nothing to do with mathematical manipulation. The note referred to a dispute as to whether floterial districts should be analyzed by the aggregate or shared-floater methods. The choice of method involves political science not mathematics. For example, the aggregate method might be appropriate where constituent districts have common interests or needs and the at-large (floater) representative represents his constituents as a

unitary group without regard to their district of residence. The shared-floater method might be appropriate where constituent districts have diverse or conflicting interests, as where they have been combined for numerical convenience only. In such a case, an at-large representative may balance his representation in proportion to each district's population. Once a method is selected, there is no dispute whatever over the appropriate mathematical calculation. In short, the only factor not involved in the "imbroglio" is the "mathematical manipulation."

The Court's desire to restrict apportionment mathematics to sixth-grade arithmetic is no excuse for demolishing the Board of Estimate. District voting power is a court-approved basis for Board apportionment that accounts for every salient feature of the Board's composition and voting rules. It employs nothing more complex than high-school algebra. No computers or computer experts are required. The computations involve nothing more than paper, pencil, and the knowledge of a reasonably bright high-school junior. The entire computation applicable to a simple majority vote of the full Board is given in Exhibit A. The resulting malapportionment is within constitutionally acceptable bounds.

THE BOARD OF ESTIMATE PROVIDES A CONSTITUTIONALLY ACCEPTABLE INSTRUMENT OF LOCAL GOVERNMENT

On remand to the District Court after the first appeal of this action, the Second Circuit indicated the kind of analysis that should be made. "Whether the present allocation of seats on the Board is a constitutionally permissible way of blending majority control with minority representation and other legitimate needs of local government is one issue to be examined on remand." (A204). The

Board, as it exists and as it operates, meets this test. Plaintiffs-appellees concede that equalization of district voting power is an acceptable means to implement one-person, one-vote principles on the Board. In fact, plaintiffs-appellees suggested an alternative plan of district voting power apportionment.

Intervenor Ponterio agrees that the voting power apportionment on the Board could be made more mathematically perfect. It is submitted, however, that the question of whether the Board configuration must be altered does not arise at all unless a determination is first made that the existing configuration is constitutionally unacceptable. There is no dispute that actual voting power on the Board is as shown in the "Vote Power" columns of Tables 1 and 2. There is no dispute that if Board voting power were apportioned with mathematical perfection according to borough populations, voting power would be as shown in the columns headed "Norm Vote Power." The malapportionment issue boils down to this: must a venerable, admittedly effective body of local government be completely revamped or discarded for the sole purpose of shifting 5 or 6% voting power from Staten Island to Brooklyn? We submit that the answer is no.

The overlay of at-large and local votes ensures that no enabling vote of the Board can occur without the vote of at least one or a combination of members representing the entire city. Clearly, there is majority control of the Board. On the full Board, the at-large members hold a majority of votes (6 out of 11) and a majority of voting power (56.52%). On the mayorless Board, the five borough presidents hold a majority of votes (5 out of 9) and voting power (53.85%). Nevertheless, majority control is still assured as it is still true that an enabling vote cannot occur without the vote of at least one or a combination of

TABLE 1

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (FULL BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY			3/4 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	13.72	8.70	-5.02	14.34	9.09	-5.25	14.80	9.38	-5.42
QUEENS	1	11.63	8.70	-2.93	12.16	9.09	-3.07	12.55	9.38	-3.17
MANHATTAN	1	8.78	8.70	-0.08	9.18	9.09	-0.09	9.47	9.38	-0.09
BRONX	1	7.19	8.70	+1.51	7.51	9.09	+1.58	7.75	9.38	+1.63
STATEN IS.	1	2.17	8.70	+6.53	2.26	9.09	+6.83	2.34	9.38	+7.04
MAYOR	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COMPTROLLER	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COUNCIL PRES.	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
MAXIMUM DEVIATION:				11.55%			12.08%			12.46%

TABLE 2

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (MAYORLESS BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	16.99	10.77	-6.22	16.90	10.71	-6.19
QUEENS	1	14.40	10.77	-3.63	14.32	10.71	-3.61
MANHATTAN	1	10.87	10.77	-0.10	10.81	10.71	-0.10
BRONX	1	8.90	10.77	+1.87	8.85	10.71	+1.86
STATEN IS.	1	2.68	10.77	+8.09	2.67	10.71	+8.04
COMPTROLLER	2	23.08	23.08	0	23.21	23.21	0
COUNCIL PRES.	2	23.08	23.08	0	23.21	23.21	0
MAXIMUM DEVIATION:				14.31%			14.23%

members representing the entire city. In the case where a 5-vote majority is achieved by the votes of the borough presidents alone, it has been argued that this gives Staten Island an undeserved veto power. What seems to have been overlooked is that even if the five borough votes were allocated on a strict population-per-vote basis (Brooklyn 1.58, Queens 1.34, Manhattan 1.01, Bronx 0.83, Staten Island 0.25) the result would be unchanged. Staten Island's 0.25 vote would be just as necessary in achieving the 5-vote total as its 1 vote under the current vote allocation. This illustration points up the danger of focussing on only one of many possibilities. It is the strength of the district voting power method that it accounts for all possibilities.[5]

The New York county board cases make clear that, except where gerrymandering is the issue, equal protection does not translate into equal opportunity of citizens to elect representatives but rather equal opportunity of representatives to act. Ordinarily in single-member, equal-population district plans, one need not confront this issue since satisfying the former requirement automatically satisfies the latter. However, suppose the New York State Assembly were modified giving two votes instead of one to members from districts south of Yonkers. It is unlikely any court would uphold such a plan even though there would be no dilution of any citizen's power to elect his representative. Conversely, if Brooklyn's borough president were allocated six times as many votes as Staten Island's (Brooklyn has six times the population of Staten island), the citizens of Brooklyn could not complain even though the alleged dilution of their power to elect a representative would remain unchanged.

5. The Mayor does not participate in votes to override a mayoral budget veto. There are then 2' or 128 possible vote outcomes. Either the Board or the City Council may initiate a veto override. Override requires a ⅔ majority of the initiating body plus simple majority vote of the other body. Therefore, a 5-vote board majority is effective only when there has already been a ⅔ majority vote in the Council.

Providing equal protection on full-fledged representational bodies that have multi-member, floterial, or mixed representational plans may raise difficult political science issues. Not so with the Board of Estimate. It functions only by voting. The obvious measure of equal protection is borough voting power. The analysis method urged by Appellant Ponterio measures just that, and shows that the Board provides an acceptable blend of majority control and borough participation.

CONCLUSION

For the reasons stated herein, this Court should note probable jurisdiction of this appeal and grant plenary review.

December 29, 1987

Respectfully submitted,

PHILIP G. MINARDO, Esq.
Attorney for Appellant
FRANK V. PONTERIO
Office & P.O. Box
350 St. Marks Place, Suite 305
Staten Island, NY 10301
(718) 442-0800

EXHIBIT A

District Voting Power Calculation
(for 6-vote majority of the full Board)
Note: The following member designations are used:
CW—a city-wide Board member (2 votes)
BP—a borough president (1 vote)

Decisive votes occur only in vote totals of 4, 5, 6, and 7. Borough Presidents have decisive votes only in vote totals of 5 and 6. City-wide members' votes are decisive in vote totals of 4, 5, 6, and 7.*

The number of distinct groups of r members that can be formed from a total population of n members is equal to: $\frac{n!}{r!(n-r)!}$. For each possible group size, the corresponding values are:

City-wide Members		*Borough Presidents*	
Group Size	*# of Groups*	*Group Size*	*# of Groups*
0	1	0	1
1	3	1	5
2	3	2	10
3	1	3	10
		4	5
		5	1

*To illustrate: If the "yes" vote total is 4, those city-wide members not voting "yes" hold decisive votes since any one of them can change the outcome by switching his 2 votes to "yes." A borough president could not change the outcome by switching his 1 vote. If the "yes" vote total is 6, all members voting "yes" hold decisive votes since any one of them can change the outcome by switching his 1 or 2 votes to "no."

The number of distinct groups of combinations of city-wide members and borough presidents is equal to the product of the number of groups of city-wide members and the number of groups of borough presidents. For example, for a combination of 1 city-wide member and 3 borough presidents, there are 3x10 or 30 distinct groups of the combination. The computation of decisive votes and resulting voting powers is shown in Table A-1, which follows.

TABLE A-1

Vote Total	Voting Combinations	No. of Combination Groups	No. of CW Members with Decisive Votes	No. of BPs with Decisive Votes	Total of CW Decisive Votes	Total of BP Decisive Votes	Total of all Decisive Votes
4	2CW+0BP	3x1=3	1	0	3	0	3
4	1CW+2BP	3x10=30	2	0	60	0	60
4	0CW+4BP	1X5=5	3	0	15	0	15
5	2CW+1BP	3X5=15	1	4	15	60	75
5	1CW+3BP	3X10=30	2	2	60	60	120
5	0CW+5BP	1X1=1	3	0	3	0	3
6	3CW+0BP	1X1=1	3	0	3	0	3
6	2CW+2BP	3X10=30	2	2	60	60	120
6	1CW+4BP	3X5=15	1	4	15	60	75
7	3CW+1BP	1X5=5	3	0	15	0	15
7	2CW+3BP	3X10=30	2	0	60	0	60
7	1CW+5BP	3X1=3	1	0	3	0	3
	Totals:	168			312	240	552

Aggregate voting power of CW members $= \frac{312}{552} = 56.52\%$;
Voting power of each CW member = $56.52\% \div 3 = 18.84\%$

Aggregate voting power of borough presidents $= \frac{240}{552} = 43.48\%$
Voting power of each borough president = $43.48\% \div 5 = 8.70\%$